RECORD AND BRIEFS

AUG 16 2017

Nos. 16-285, 16-300, and 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORP.,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *ET AL.*,
Petitioners,
v.
STEPHEN MORRIS, *ET AL.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING RESPONDENTS IN NOS. 16-285 AND 16-300, AND PETITIONER IN NO. 16-307

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a non-profit consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements. It advocates for legislation and regulations concerning the use of arbitration agreements in consumer and employment contracts, and it has appeared as amicus curiae in this Court and others in many cases involving arbitration. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). Public Citizen's attorneys have also represented parties in many cases involving such issues in this Court and other federal and state courts. Among other cases, Public Citizen attorneys argued *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), both of which figure prominently in the briefing in these cases.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. General letters of consent to the filing of amicus briefs from counsel for all parties are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Critical to the outcome of this case is whether the Federal Arbitration Act (FAA) requires enforcement of employer-employee arbitration agreements that contain provisions preventing employees from engaging in concerted activity for mutual aid and protection. As the briefs of the National Labor Relations Board (NLRB) and the individual employees who are parties to these cases demonstrate, engaging in collective litigation efforts (whether through joinder, class actions, statutory collective actions, or litigation by employee organizations) falls easily within the plain meaning, purpose, and judicial and administrative construction of the scope of concerted activity under the federal labor laws. Contracts in which employers seek to forbid employees to engage in such activity are thus unenforceable under section 3 of the Norris-LaGuardia Act (NLGA), 29 U.S.C. § 103, and illegal under section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1).

Public Citizen does not intend to reiterate the arguments of the parties demonstrating that concerted legal proceedings fall within the scope of protection of the NLRA and NLGA. However, Public Citizen believes that further discussion of the issue whether the FAA requires enforcement of provisions in arbitration agreements that interfere with the right to engage in concerted activity may be of assistance to the Court.

The argument that the FAA permits arbitration agreements to do what other contracts cannot—negate rights protected by federal statute—depends heavily on the proposition that a federal law may only "override" the FAA if it expressly prohibits enforcement of

arbitration agreements. That view, however, rests on a line of precedent that has no application here, involving whether particular statutes altogether prohibit arbitration of claims arising under them. This case involves no assertion that any type of claim cannot be arbitrated, nor any other challenge to arbitration per se; it concerns only a conflict between a particular term in an arbitration agreement and specific statutory rights that enforcement of that term would infringe. The FAA does not mandate enforcement of a contractual provision that violates such specific rights merely because it is part of an arbitration agreement.

Indeed, this Court has repeatedly stated that the FAA does not operate to deprive parties to arbitration agreements of statutory rights, such as the fundamental right to engage in concerted activity at issue here. That understanding of the FAA—that it operates as a forum-selection provision without otherwise altering the rights of the parties—strongly supports the conclusion that the NLRA, NLGA, and FAA are best harmonized by a holding that, while employers and employees may agree to arbitrate claims, the FAA neither requires nor permits arbitration agreements that would interfere with the right to engage in concerted activity under the NLRA and NLGA. By contrast, a holding that subordinated statutory rights conferred by the NLRA and NLGA to provisions in arbitration agreements would perversely open the door to the inclusion of other unlawful provisions in arbitration agreements—including, for example, agreements that purported to bar employees from reporting grievances to the NLRB.

The proper reading of the statutes is confirmed by the FAA's "saving clause," which provides that arbitration agreements are not enforceable to the extent there are grounds at law or in equity for setting them aside that apply equally to non-arbitration agreements. 9 U.S.C. § 2. The NLRA and NLGA provisions that render contracts that infringe the right to engage in concerted activity unenforceable fall readily within the terms of the saving clause, as they establish rules of both law and equity that are applicable not merely to arbitration agreements, but to any contract between employers and employees protected by the federal labor laws. The principles that make arbitration agreements that preclude concerted activity unenforceable do not single out arbitration agreements for unfavorable treatment, but apply evenhandedly to a broad range of illegal employer conduct.

Nor can the NLRA's and NLGA's protections be cast aside on the theory that they are incompatible with the nature of arbitration and thus interfere with achievement of the FAA's purposes and objectives. That theory has no place in this case, because it is derived from concepts of implied federal preemption of state law, which do not determine the relationship of two or more federal laws: Federal statutes, unlike state laws, may and often do limit the achievement of the objectives of prior federal statutes. In any event, concerted activity is not incompatible with arbitration of workplace disputes. The two have coexisted comfortably for more than eight decades, particularly since the enactment of the NLRA. This Court can give full effect to the NLRA's and NLGA's protection of concerted activity without in any way destroying the essential attributes of workplace arbitration.

ARGUMENT

I. The FAA does not require enforcement of provisions of an arbitration agreement that infringe workers' statutory rights to engage in concerted activity.

The Acting Solicitor General and the employers in each of these cases argue that contractual terms that would otherwise be unenforceable and unlawful are, under the FAA, enforceable if included in an arbitration agreement. That argument rests in large part on the assertion that under decisions of this Court such as *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), statutes that do not "expressly prohibit arbitration" do not "displace" the FAA. *E&Y* Pet. Br. 22; *see also Epic* Pet. Br. 16–18. According to the Acting Solicitor General, these precedents teach that the FAA's "presumption" that an arbitration agreement is enforceable can be "overcome" only by a "specific congressional command" that "address[es] arbitration agreements *in particular*." SG Br. 18.

These arguments rely on a line of cases that address a different problem and rest on reasoning inapplicable to the issue posed by this case. In *CompuCredit* and most other precedents cited by the employers and the Acting Solicitor General, the issue was whether the FAA requires enforcement of an agreement to arbitrate a private right of action created by a federal statute. This Court had originally interpreted the FAA as not applying generally to rights of action created by federal statutes because it viewed the ability to access a court for resolution of statutory claims as part and parcel of the rights created by the statute creating the right of action. *See Wilko v. Swan*, 346 U.S. 427, 433–38 (1953). But beginning with *Scherk v. Alberto-Culver*

Co., 417 U.S. 506 (1974), and continuing with a string of cases from the 1980s onward, the Court adopted a different view: that arbitration involves a choice of forum that the FAA authorizes parties to make, and courts to enforce, for a broad range of claims.[2]

Given the Court's construction of the FAA as a general authorization of arbitration of both common-law and statutory claims, the Court has adopted the view that if Congress, acting against the backdrop of that statutory authorization, creates a right of action, courts should generally infer an intent that the claim will be subject to arbitration. *See CompuCredit*, 565 U.S. at 98. Accordingly, in evaluating arguments that particular types of statutory claims are not subject to compelled arbitration under the Act, the Court has looked for a "congressional command" to "overrid[e]" the FAA and exempt them from arbitration. *Id.* As a corollary, the Court has held that the language Congress commonly uses to create a right of action does not by itself constitute a command that the right cannot be subject to arbitration under the FAA. *See id.* at 100–01. Thus, the Court has looked for specific indications that Congress intended to exclude a particular type of claim from arbitration, *see id.* at 103–04, although it has not necessarily insisted on statutory language that addresses arbitration agreements expressly.

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[2] *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 428 (1985); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 & n.10 (2002); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009); *CompuCredit*, 565 U.S. at 101–02.

Those principles, however, have no bearing on the issue in this case, which does not involve an argument that a statute creating particular rights of action prohibits their arbitration. Indeed, the issue here is not whether *any* type of claim is or is not subject to arbitration. The NLRB, and the employees, do not here claim that the NLRA or NLGA "overrides" the FAA by categorically exempting from arbitration claims asserted by employees under those statutes or any others.[3] The principle that the creation of a right of action does not "override" the FAA absent a more specific congressional command thus has no application here.

Rather, the issue in this case is whether a particular feature of an arbitration agreement—its prohibition of concerted action—violates rights to engage in concerted action specifically granted by other federal statutes. The line of cases exemplified by *CompuCredit* does not address such an issue. Nor has the Court ever addressed the circumstance where one element incorporated in an arbitration agreement—but not the requirement of arbitration as such—directly conflicted with a right granted by a federal statute. To the extent they have touched on the point, however, the Court's opinions strongly indicate that the employers and Acting Solicitor General are wrong to assert that the FAA requires enforcement of parts of an arbitration agreement that conflict with a statutorily created right unless the statute creating the right specifically addresses its application to arbitration.

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[3] Of course, the statutes at issue—the NLRA and NLGA—do not create the rights of action asserted by the employees in the *Epic* and *Ernst & Young* cases. Indeed, the provisions of those statutes relevant here do not create private rights of action for individual employees against employers.

In particular, this Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), although cited by the employers and Acting Solicitor General as supporting their views, suggests a very different approach from the one they advocate. In *Italian Colors*, parties challenging an arbitration agreement's class-action ban asserted that the provision violated nonwaivable rights to engage in collective litigation under the antitrust laws and Federal Rule of Civil Procedure 23. If the view of the Acting Solicitor General and the employees were correct, the Court would have had to go no further to reject the argument than to point out that neither the antitrust laws nor Rule 23 refer specifically to arbitration.

But that approach is not the one the Court took. Instead, the Court examined the antitrust laws and Rule 23 and concluded that they did not in fact create a *right* to engage in collective litigation that could not be waived by a private agreement. *See id.* at 2309–10. The Court's mode of analysis strongly signals that, had the Court found a federal statutory basis for the claimed right, it would have sufficed to establish a "congressional command" that would overcome the otherwise applicable principle that courts will enforce agreements establishing "the rules under which ... arbitration will be conducted." *Id.* at 2309 (citation omitted).

Here, where the relevant statutes expressly grant workers a right to engage in concerted action—a right that encompasses collective legal proceedings and is not subject to waiver in employment agreements—the analysis of *Italian Colors* thus supports the conclusion that the FAA does not require enforcement of provisions of an arbitration agreement that violate that right.

II. The FAA is best read together with the NLRA and NLGA to preserve workers' right to engage in concerted activity.

That the FAA does not negate the right to engage in concerted activity under federal labor laws finds further support in the Court's repeated statements that the FAA itself does not operate to deprive parties to arbitration agreements of substantive rights. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2310; *Pyett*, 556 U.S. at 266; *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Waffle House*, 534 U.S. at 295 n.10; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 481; *McMahon*, 482 U.S. at 229–30; *Mitsubishi*, 473 U.S. at 637 n.19.

The Court has stated this proposition in explaining that arbitration of a statutory right of action is not inconsistent with the statute creating the right, as long as the arbitration agreement allows a party to obtain relief on the statutory claim and thus "satisfies the statutory prescription of civil liability in court." *CompuCredit*, 565 U.S. at 101. But the insight underlying the Court's statements—that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum," *Mitsubishi*, 473 U.S. at 628—has broader application. The principle that a party "relinquishes no substantive rights" when agreeing to arbitrate, *Preston v. Ferrer*, 552 U.S. 346, 359 (2008), is as applicable where, as here, a particular provision of an arbitration provision *directly* infringes a statutory right as it is when the provision interferes with the right by not permitting relief for claims based on the statute.

In light of this Court's consistent statements that the FAA does not limit rights otherwise granted by statute, and its implicit recognition in *Italian Colors* that the FAA does not require enforcement of provisions in an arbitration agreement that would violate statutory rights, a holding that the FAA does not authorize enforcement of provisions in an arbitration clause that infringe a worker's statutory right to engage in concerted activity represents "the best way to harmonize the statutes." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2237 (2014). That view gives all of the relevant statutes ample scope: It permits enforcement (subject to applicable contract-law principles) of agreements between workers and employers providing for arbitration of any otherwise arbitrable claim, and prohibits only enforcement of particular provisions within an arbitration agreement that would interfere with the right to engage in concerted action by preventing any form of collective legal action. Such a reading treats "each statute as effective because of its different requirements and protections," *id.* at 2238 (quoting *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001)), and gives each "its own scope and purpose." *Id.*

The contrary view of the employers and the Acting Solicitor General, under which provisions in arbitration agreements that violate otherwise applicable statutory rights must be enforced unless the statute creating the right "address[es] arbitration agreements *in particular*," SG Br. 18, would produce incongruous "result[s] that Congress likely did not intend." *POM Wonderful*, 134 S. Ct. at 2239. For example, as the employees' briefs have pointed out, that view suggests that the FAA would require enforcement of provisions in arbitration agreements that would otherwise violate Title

VII's prohibitions on race and sex discrimination—for example, provisions requiring male arbitrators in cases involving claims of sexual harassment or discrimination asserted by women employees, or white arbitrators in cases brought by African-American employees—because Title VII does not explicitly say it applies to procedural provisions in arbitration clauses.

Perhaps a bit closer to home on the facts of this case, the employers' and Acting Solicitor General's position would seemingly call for the enforcement of an arbitration agreement that provided that it was the sole remedy for any claims involving unfair labor practices and thus purported to preclude a worker from complaining to the NLRB about such practices. The NLRA expressly prohibits employers from retaliating against workers who file unfair labor practice charges, 29 U.S.C. § 158(a)(4), and this Court (as well as the NLRB) has long recognized that "Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board." *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967). Thus, "it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges." *Id.* (citing cases).

These fundamental prohibitions of the NLRA, however, are no more express or specific in their application to arbitration agreements than is the protection for concerted activity. Thus, a ruling in this case that the FAA requires enforcement of a prohibition on concerted legal proceedings in the face of the NLRA and NLGA would similarly indicate that an arbitration clause could displace an employee's right to complain about unfair labor practices to the NLRB.

Importantly, the notion that an employer would seek to use an arbitration agreement in such a manner is far from fanciful. Employers have already argued in other cases that filing unfair labor practice charges breaches arbitration agreements. *See, e.g., Fallbrook Hosp. Corp. v. Cal. Nurses Ass'n*, 652 F. App'x 545 (9th Cir. 2016); *Hosp. of Barstow, Inc. v. Cal. Nurses Ass'n*, 2013 WL 6095559 (C.D. Cal. Nov. 9, 2013), *app. dism'd*, No. 13-57131 (9th Cir. July 2, 2014). Although the courts in those cases saw no merit to the argument that a provision in an arbitration agreement could displace a right conferred by the NLRA, a decision by this Court that the arbitration agreements here are enforceable would, at a minimum, cast significant doubt on those rulings. And without question, employers willing to use arbitration to displace the labor laws' protection of concerted activity and free themselves from accountability in collective legal proceedings would be just as eager to use arbitration to excuse themselves from having to account for their actions before the Board.

III. The FAA's saving clause reinforces the conclusion that the FAA does not displace workers' rights under the NLRA and NLGA.

Because the relevant statutes are best read together to preclude enforcement of a provision in an arbitration clause that interferes with the right of workers to engage in concerted activity, this Court need not consider the effect of the FAA's "saving clause," found in the final phrase of 9 U.S.C. § 2. Consideration of the clause, however, underscores that the illegality and unenforceability of a provision of an arbitration clause under the NLRA and NLGA renders that provision unenforceable under the FAA as well.

A. The labor laws' prohibition on enforcement of contracts that interfere with concerted activity provides "grounds [that] exist at law or in equity for the revocation of any contract" within the meaning of the saving clause.

The saving clause "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting 9 U.S.C. § 2). The NLRA's and NLGA's provisions rendering contracts interfering with the right to engage in concerted action illegal and unenforceable fall straightforwardly within the description of the "grounds" the saving clause establishes for denying enforcement to a provision in an arbitration agreement.

The employers and the Acting Solicitor General, however, contend that a "saving clause" in a federal statute is somehow, by nature, inapplicable to another federal law, but can only "save" a state law. *See Epic* Pet. Br. 20; *E&Y* Pet. Br. 34; SG Br. 31. (At the same time, the Acting Solicitor General acknowledges that nothing in the FAA's language supports that view. *See* SG Br. 31.) But generalities about saving clauses do not determine the effect of the FAA's language.[4] "Saving clause" is not a rigidly defined legal term of art, and it is even not a term used in the FAA itself; it is a label of convenience applied by this Court to the relevant language in section 2 of the FAA. That language, not the

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[4] As the respondents' brief in the *Epic* case demonstrates, the employers' and Acting Solicitor General's argument is wildly inaccurate even as a matter of the conventional, generic usage of the term "saving clause." *See Epic* Resp. Br. 38.

label "saving clause," determines the effect of the statute.

The language of section 2 looks to "such grounds as exist in law or in equity," not to whether the source of those legal or equitable grounds is federal or state authority. The NLRA's prohibition of contracts interfering with the exercise of protected rights is surely a "ground" that "exist[s] in law." And the NLGA's prohibition on enforcement of contracts that interfere with concerted activity explicitly establishes grounds for denying enforcement of contracts both at law and in equity. *See* 29 U.S.C. § 103 (providing that contracts violating the public policy protecting concerted action "shall not afford any basis for the granting of legal or equitable relief").

The employers and Acting Solicitor General, however, assert that the NLRA and NLGA do not render "any contract" unenforceable, but only contracts to which they apply. That contention, however, would be equally applicable to *all* legal or equitable principles affecting the validity or enforceability of contracts. The argument would thus render the saving clause virtually meaningless. Its interpretive error lies in its confusion of the requirement that a ground for revocation under the saving clause be applicable to "any contract" with a requirement that the ground be applicable to "*every* contract." As a simple matter of English usage, the NLRA and NLGA fall within the saving clause because they provide a ground for setting aside "any contract" in which an employer purports to interfere with the right of covered employees to engage in concerted activity within the meaning of the federal labor laws.

The employers' "any contract" argument not only finds no support in the plain meaning of the statutory

language, but is also foreclosed by this Court's decisions. The Court has considered the scope of the saving clause in a string of decisions going back to *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and as recent as *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), and given it a meaning incompatible with the contention that a principle must be broadly applicable to every contract to render an arbitration clause unenforceable under the saving clause. Under this Court's longstanding construction, the "such grounds as exist at law or in equity for the revocation of any contract" language "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 583 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).[5] As the Court stated this past Term in *Kindred*, the clause "establishes an equal-treatment principle" that allows courts to inval-

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[5] The suggestion of the employers in *Epic* that the saving clause applies only to defenses relating to a narrow understanding of the "making" of an agreement, *Epic* Pet. Br. 28, is flatly at odds with this Court's repeated recognition that the saving clause broadly incorporates defenses to the "validity of arbitration agreements." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006); *see also Concepcion*, 563 U.S. at 339; *Kindred*, 137 S. Ct. at 1426. The argument also reads critical words out of section 2, including "enforceable" and the key word "revocation," which are not specific to contract formation. This Court has accordingly read the FAA provisions that allow parties to enforce arbitration provisions (sections 3 and 4) not to "substantively restrict[]" section 2's enforceability provisions. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009).

idate arbitration agreements on the basis of legal defenses to contract enforcement if those rules are not "tailor-made to arbitration agreements" and do not "singl[e] out those contracts for disfavored treatment." 137 S. Ct. at 1426, 1427.

The legal and equitable grounds at issue here are not specific to arbitration agreements in that sense and, thus, are protected by the saving clause. The NLRA and NLGA prohibit enforcement of employer-employee contracts that interfere with workers' exercise of the right to engage in concerted activity regardless of whether the contracts involve arbitration, or even whether the contracts involve resolution of legal disputes at all. Thus, the statutes would render unenforceable a contract that, while not requiring arbitration, purported to prohibit employees from pursuing collective legal actions in court. But they also have much broader application: They invalidate all manner of potential contracts through which an employer might seek to interfere with concerted activity—from the traditional "yellow dog" contract prohibiting employees from joining a union, to efforts to prevent such activities as distribution of newsletters and protests of working conditions, *see Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565–66 (1978); *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 14–15 (1962), to twenty-first-century contracts seeking to prevent employees from engaging in "inappropriate" discussions on Facebook and other social media platforms. *See, e.g.*, *Three D, LLC v. NLRB*, 629 F. App'x 33 (2d Cir. 2015).

The breadth of the types of contracts covered by the NLRA and NLGA principles at issue refutes any suggestion that they are "too tailor-made to arbitration agreements ... to survive the FAA[]." *Kindred*, 137 S.

Ct. at 1427. Unlike the state-law rule targeting arbitration that the Court held to be outside the saving clause in *Kindred*, these principles cannot possibly be characterized as establishing an "arbitration-specific ... rule, much as if [they] were made applicable to arbitration agreements and black swans." *Id.* at 1428. Far from applying merely to arbitration agreements and a "slim set of ... utterly fanciful [non-arbitration] contracts," *id.* at 1427, the protection of concerted activity applies to a great range of common employer conduct—including the practice of requiring employees to sign arbitration agreements that waive the right to engage in concerted activities. That breadth qualifies them as generally applicable contract defenses under the saving clause and this Court's decisions construing it.

B. The rights created by the NLRA and NLGA cannot be displaced on the theory that they interfere with fundamental attributes of arbitration.

Notwithstanding the text of section 2 and this Court's cases addressing it, respondents and the Acting Solicitor General contend that application of the NLRA's and NLGA's protection of concerted activity to arbitration clauses would "interfere with fundamental attributes of arbitration," SG Br. 32–33 (quoting *Concepcion*, 563 U.S. at 344), and they invoke *Concepcion*'s observation that the saving clause does not "preserve *state-law* rules that stand as an obstacle to the accomplishment of the FAA's objectives," SG Br. 32 (quoting *Concepcion*, 563 U.S. at 343) (emphasis added).

As the Acting Solicitor General himself acknowledges, however, that observation does not govern this case because it reflects the application of the saving clause in the context of implied preemption of *state-law*

contract principles. *Id.* at 33. The Court's implied preemption doctrine condemns state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). That doctrine is controversial even in its application to state laws, *see Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment), and it is quite clear that it does not control the relationship between two federal laws, *see POM Wonderful*, 134 S. Ct. at 2236.

Congress, unlike the states, is fully empowered to enact statutes limiting the extent to which other federal laws accomplish their full purposes. And because "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987), it is natural to look to other enactments (particularly subsequent ones) as expressions of "legislative choice" concerning "what competing values will or will not be sacrificed to the achievement of a particular objective," *id.* Thus, where, as here, federal statutes establish generally applicable grounds for non-enforcement of a contract, the FAA's saving clause supports application of those grounds to provisions in an arbitration agreement, without the conflict-preemption-based overlay of considering whether doing so would interfere with "fundamental attributes of arbitration."[6]

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[6] Indeed, if the NLRA and NLGA *were* viewed as incompatible with essential features of arbitration, such a conflict with a previously enacted law would constitute an implied repeal (or an express repeal in the case of the NLGA, *see* 29 U.S.C. § 115), and for that reason the labor laws would still have to be given effect rather than the FAA. *See POM Wonderful*, 134 S. Ct. at 2237 (noting that a later statute impliedly repeals an earlier one if they are in irreconcilable conflict).

In any event, no interference with fundamental attributes of arbitration would result from a ruling that employers may not consign employees protected by the NLRA and NLGA to individual arbitration as their exclusive means of resolving legal disputes arising out of their employment. The contrary argument of the employers and Acting Solicitor General rests on this Court's statements in *Concepcion* and *Italian Colors* that limiting arbitration to "bilateral" proceedings is essential to preserving the speed, informality, low costs, and low stakes that the Court there saw as "fundamental" to the "benefits" of consumer and commercial arbitration. *See Concepcion*, 563 U.S. at 347–51; *Italian Colors*, 133 S. Ct. at 2312. But *Concepcion* itself recognizes that the nature of arbitration procedures may vary with "the type of dispute." 563 U.S. at 344. Regardless of whether bilateral proceedings are a fundamental attribute of consumer or commercial arbitration, that is not and has never been true of workplace arbitration.

As this Court has long emphasized, the critical attributes that make workplace arbitration desirable are substantially different from those of commercial arbitration because "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). Arbitration of workplace disputes developed as an *expression* of workers' right to engage in concerted legal activity, not as a means of suppressing it. Both before and after the enactment of the NLRA, arbitration was widely adopted in collective bargaining agreements as a preferred mechanism for resolving workplace grievances. *See, e.g., United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36–37 (1987); Amicus Br. of

Ten Int'l Labor Unions, *et al.*, 28–31. Such arbitration by nature involves concerted activity, with unions representing both individual workers and large groups of workers in resolving workplace disputes.[7]

This Court long ago held that arbitration agreements in collective bargaining agreements are judicially enforceable, *see Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), and soon thereafter issued its decisions in the "*Steelworkers Trilogy*," affirming a strong federal policy in favor of enforcement of such agreements.[8] The Court's decisions make clear that the fundamental attributes of workplace arbitra-

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[7] By contrast, individual arbitration of workplace disputes is a relatively recent phenomenon, largely postdating this Court's interpretations of the FAA in *Gilmer* and *Circuit City*. Before the 1991 decision in *Gilmer*, the issue whether claims under federal statutes governing employment were arbitrable was disputed. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Moreover, before *Circuit City*, whether the FAA even applied to employment contracts was uncertain, as employment contracts not deemed to involve interstate commerce fell entirely outside the FAA's scope. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956). And those that involved interstate commerce were, until relatively recently, widely thought to fall within the statute's exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce," 9 U.S.C. § 1; *see Circuit City*, 532 U.S. at 129–30 (Stevens, J., dissenting) (citing cases). *Circuit City*'s conclusion that the FAA exception is limited to cases involving transportation workers, together with *Gilmer*'s approval of arbitration of statutory employment-law claims, gave rise to widespread use of arbitration for individual employment claims, as well as collective ones.

[8] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Warrior & Gulf*, 363 U.S. 574; *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

tion are quite different from those the Court has subsequently ascribed to commercial arbitration.

"In the commercial case, arbitration is the substitute for litigation. [In labor cases,] arbitration is the substitute for industrial strife." *Warrior & Gulf*, 363 U.S. at 578. Workplace arbitration has therefore rested not on perceived needs for streamlined and exclusively bilateral dispute resolution, but on a preference for mechanisms of "industrial self-government" that allow resolution of questions arising between groups of workers and their employers by mutually trusted, expert arbitrators familiar not only with governing legal principles, but also with the practices of the industry and the "common law of the shop." *Id.* at 581–82. Assertions that concerted activity is incompatible with the fundamental nature of workplace arbitration, or that employers will not choose arbitration unless they can use it as a means of prohibiting collective action, run counter to the entire history of workplace arbitration since enactment of the NLRA.[9]

To be sure, allowing employers to enforce contracts requiring employees to use bilateral arbitration to resolve purely *individual* disputes because of the advantages employers perceive in "streamlined proceedings." *Concepcion*, 563 U.S. at 344, may also serve the purposes of the FAA as they are currently understood

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[9] Although the Court's earliest decisions relied on section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, as the basis for the courts' power to enforce arbitration provisions in collective bargaining agreements (because at the time the FAA's application to employment contracts and to statutory claims generally was in doubt), *see Lincoln Mills*, 353 U.S. at 456, it has subsequently treated such provisions as involving arbitration within the meaning of the FAA, *see Pyett*, 556 U.S. at 254, 265, 269 n.10.

and may be consistent with federal labor law as well. But where *collective* grievances are at issue, precluding enforcement of arbitration agreements that prohibit concerted activity not only gives effect to the labor laws' protection of that activity, but also preserves what has historically been the primary advantage of arbitration in the employment context—its usefulness as a means to foster "industrial peace" and as a "substitute for industrial strife," *Warrior & Gulf*, 363 U.S. at 578, through the resolution of workplace disputes on a collective rather than individual basis. By allowing both for individual arbitration of purely individual disputes, and for enforcement of arbitration agreements that allow concerted activity for disputes involving multiple employees, the NLRA and NLGA amply preserve the "fundamental attributes" of workplace arbitration.

CONCLUSION

For these reasons, as well as those set forth in the briefs of the NLRB and the employee parties, the Court should affirm the judgments of the courts of appeals in Nos. 16-285 and 16-300, and reverse the judgment of the court of appeals in No. 16-307.

Respectfully submitted,

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